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Queensland Court of Appeal Opines on the Meaning of “Material Prejudice”

The decision of Wilson J in *Wilson v Mirvac Queensland Pty Ltd*¹ was the subject of an article in an earlier edition of this journal.² At that time, it was foreshadowed that the decision was to be taken on appeal. The decision of the Court of Appeal in *Mirvac Queensland Pty Ltd v Wilson*³ is considered in this article.

At First Instance

The decision of Wilson J in *Wilson v Mirvac Queensland Pty Ltd*⁴ involved the interpretation of the term “material prejudice” for the purpose of s 214 of the *Body Corporate and Community Management Act 1997* (Qld).

Section 213 of the *Body Corporate and Community Management Act 1997* (Qld) obliges the seller of a proposed lot to provide the buyer with a disclosure statement before the contract is entered into. Where the seller subsequently becomes aware that information contained in the disclosure statement was inaccurate when the contract was entered into or the disclosure statement would not be accurate if now given as a disclosure statement, the seller must, within 14 days, give the buyer a further statement rectifying the inaccuracies in the disclosure statement.⁵

Provided the contract has not been settled, where a further statement varies the disclosure statement to such a degree that the buyer would be materially prejudiced if compelled to complete the contract, s 214(4) of the *Body Corporate and Community Management Act 1997* (Qld) provides that the buyer may cancel the contract by written notice given to the seller within 14 days, or a longer period as agreed between the parties, after the seller gives the buyer the further statement.

Mrs Wilson was the purchaser of a proposed residential lot in stage 2 of Mirvac’s Tennyson Reach development. After stage 1 of the development had been completed, Mirvac provided Mrs Wilson with a further statement pursuant to s 214 of the *Body Corporate and Community Management Act 1997* (Qld) explaining how certain inaccuracies in the first statement would be rectified together with a substitute disclosure statement incorporating the changes. While the documentation included some proposed assets of the body corporate there was no reference to the certain security equipment.

Within the available 14 day statutory period, Mrs Wilson purported to cancel the contract on the basis that she would be materially prejudiced if compelled to complete. In this regard, Mrs Wilson advised that security was a very important consideration for her husband and herself, given their personal circumstances (Mrs Wilson’s husband being a Federal Magistrate who was commonly involved with family law matters), and the proximity of the building to the State Tennis Centre and proposed public parklands. To a lesser extent, Mrs Wilson also considered that the absence of artworks, decorative items and a BBQ and tables and chairs detracted from the amenity of the development. Finally, Mrs Wilson considered that the provision of lift curtains were necessary to prevent damage occurring when items were being moved in or out of the building, and to minimise the expense that would be incurred by the body corporate if that were to occur.

Over two weeks later (and outside the 14 day statutory period available for cancellation purposes), Mirvac’s solicitors advised that, by oversight, some of the assets which had already been provided by Mirvac upon completion of stage one had not been listed when the further statement was provided. A further statement was enclosed confirming Mirvac’s original undertaking to provide all of the assets listed in the original disclosure statement including the security equipment and other assets listed above.

¹ [2010] QSC 87.

² Bill Dixon, “The Meaning of ‘Material Prejudice’” (2010) 30 *Qld Lawyer* 100.

³ [2010] QCA 322.

⁴ [2010] QSC 87.

⁵ *Body Corporate and Community Management Act 1997* (Qld) s 214(1) and s 214(2).

Wilson J noted that the test for determining whether a buyer would be materially prejudiced if compelled to complete a contract within the meaning of s 214(4)(b) had not been authoritatively determined previously.⁶ Wilson J considered the following matters to be clear:

- (a) The test is objective having regard to the particular buyer's circumstances: would someone in the buyer's circumstances be materially prejudiced?
- (b) Material prejudice must be assessed in light of the buyer's circumstances when the further statement is received or at the very latest 14 days from receipt;
- (c) A causal relationship is needed between the inaccuracy and the prejudice;
- (d) There is a need for proportionality between the inaccuracy and the prejudice; and
- (e) As part of consumer protection legislation, the term should be construed beneficially.⁷

Applying these principles, Wilson J held that Mrs Wilson had validly cancelled the contract on the premise⁸ that the body corporate would not have a security system that had been promoted as an integral feature of the development where security was a very important consideration for Mrs Wilson.

On Appeal

The Queensland Court of Appeal (McMurdo P, Fraser JA and Jones J) dismissed Mirvac's appeal.

In upholding the decision of Wilson J,

Comment

As noted by McMurdo P, while this result may appear harsh to sellers it is consistent with one of the objects of the legislation namely to provide an appropriate level of consumer protection for putative buyers of lots included in community titles schemes. Consistent with the level of consumer protection intended, both the original disclosure statement and any further statement are prescribed by statute to have contractual effect allowing a putative buyer to rely upon the information in both as being warranted to be accurate by the seller

Bill Dixon

⁶ *Wilson v Mirvac Queensland Pty Ltd* [2010] QSC 87, [26].

⁷ *Ibid* [32].

⁸ Wilson J accepted the submission on behalf of Mrs Wilson that the statutory right of cancellation is dependent on the content of the disclosure statement and the further statement, not on other facts unknown to the buyer, but known to the seller.